1960

J. Delmar Kirk et al v. Wayne D. Criddle et al : Brief of Respondents

Utah Supreme Court

E. J. Skeen; Walter L. Budge; Richard R. Boyle; Attorneys for Respondent;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF ALL WATER, BOTH SURFACE AND UNDERGROUND, IN THE ESCALANTE VALLEY DRAINAGE AREA.

In Re: Water Users' Claims Nos. 551, 479, 611, 612 and 1342,

J. DELMAR KIRK, Executor of the Estate of D. E. KIRK, Deceased, et al.,

Plaintiffs and Appellants,

vs.

WAYNE D. CRIDDLE, State Engineer of the State of Utah; and MILFORD PRIMARY RIGHTS PUMPERS ASSOCIATION; an unincorporated association,

Defendants and Respondents.

Case No.

9283

RESPONDENTS' BRIEF

E. J. SKEEN,
Attorney for Respondent Milford Primary Pump Users,
WALTER L. BUDGE,
Attorney General,
RICHARD R. BOYLE,
Assistant Attorney General,
Attorneys for Respondent Wayne D. Criddle.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF ALL WATER, BOTH SURFACE AND UNDERGROUND, IN THE ESCALANTE VALLEY DRAINAGE AREA.

In Re: Water Users' Claims Nos. 551, 479, 611, 612 and 1342,

J. DELMAR KIRK, Executor of the Estate of D. E. KIRK, Deceased, et al.,

Plaintiffs and Appellants,

vs.

WAYNE D. CRIDDLE, State Engineer of the State of Utah; and MILFORD PRIMARY RIGHTS PUMPERS ASSOCIATION; an unincorporated association,

Defendants and Respondents.

Case No. 9283

RESPONDENTS' BRIEF

PRELIMINARY STATEMENT

This brief is filed in behalf of both the respondent, Wayne D. Criddle, State Engineer, and the respondent, Milford Primary Rights Pumpers Association. Reference to the trial record will be designated herein by the letter R and to appellants' brief by the letter B.

STATEMENT OF FACTS

The respondents desire to supplement the statement of facts contained in the appellants' brief.

With respect to Claim No. 551, Perrine Howarth, the record shows that a survey of the land claimed to have been irrigated was made by the State Engineer in 1942 and again in 1952 and there were no indications, on the ground, of irrigation of the land described in Claim No. 551 (R. 2, 9). Mr. Hubert Lambert, Deputy State Engineer, testified as follows:

> "Q. Do you recall the ground as you saw it in 1942?
>
> "A. Yes, I recall that particular ground, the cross roads crossing the line of our particular level survey and also for our hydrographic survey.
>
> "Q. And do you recall seeing any indications of the ground irrigation, in 1942?
>
> "A. As I recall that well, the well was in complete disrepair at that time, but it was one of several on that tract, I think we actually found some casings further over in the 40 acre tract at that particular time, there was no evidence of a house which had been lived in on the place at the time we saw it in '42. but the well was completely caved and any evidence of ditches or irrigated land at that time was not apparent.
>
> "Q. The land covered with brush?

> "A. As I recall this land wasn't too heavily covered with brush, I think it was rather sparsely covered with brush, and that would have been rabbit brush, largely, rather than the greasewood, as I remember."

On cross-examination Mr. Lambert admitted that the conditions related above won't preclude irrigation "perhaps 14 years earlier" (R. 10).

The record contains similar evidence with respect to some of the other claims involved in the appeal. It is apparent from the reading of the entire record that the wells on which claims were filed were used for a short period of time for the purpose of "proving up on the land" and were not again used for 25 to 35 years. The casings were permitted to deteriorate and the wells caved in, ditches were abandoned and the land grew up in brush (R. 10).

As indicated by the record, the evidence was presented to the court without written pleadings and the court made its ruling without argument. No opportunity was given to contend that the water rights had been lost by intentional abandonment.

STATEMENT OF POINTS

POINT I.

THE FINDINGS THAT ONLY TEN ACRES WERE IRRIGATED IS SUSTAINED BY THE EVIDENCE.

POINT II.

THE EVIDENCE SUSTAINS THE INTERLOCUTORY ORDER ON THE THEORIES OF BOTH NON-USE AND ABANDONMENT.

ARGUMENT

POINT I.

THE FINDINGS THAT ONLY TEN ACRES WERE IRRIGATED IS SUSTAINED BY THE EVIDENCE.

It is well settled that the findings of the trial court must be sustained on appeal if supported by substantial evidence. It is not the province of this court to put itself in the place of the trier of fact and decide on the weight of the evidence. *Mayer* vs. *Criddle*, 355 P. 2d 64, .. Utah 2d .. . The finding that only ten acres of land were irrigated and is supported by the testimony of Mr. Goodwin (R. 5-7) and by the testimony of Mr. Lambert (R. 9, 10); the trial court was fully justified in accepting their testimony.

It appears that this point argued by the appellants is entirely out of order because the court denied Claim No. 551 in toto. If this denial was error the case should be remanded with a direction to the trial court to take further evidence on this question. The problems as to whether there were ten or twenty acres irrigated is not properly before this court.

POINT II.

THE EVIDENCE SUSTAINS THE INTERLOCUTORY ORDER ON THE THEORIES OF BOTH NON-USE AND ABANDONMENT.

It is admitted that no water from the wells involved in the various claims has been used for several decades. The evidence is uncontradicted that the use in each case was only for a period of one to three years. The wells were then permitted to deteriorate and cave in, further cultivation of the land was discontinued, the ditches disappeared by the passage of years and the land which it is claimed was formerly irrigated has been permitted to grow up in brush (R. 10). There is no evidence whatever of any intention by the original claimants or their successors to resume use of the water.

Even when the underground water claims were filed in the State Engineer's Office and Statements of Water Users Claims were filed pursuant to the pending general adjudication suit, the land remained in its abandoned condition and no improvements were made on any well involved in the appeal.

On May 15, 1945, the abandonment and non-use statute (now 73-1-4, U. C. A. 1953) was amended to include underground water, and still this condition continued. No use whatever was made of

these rights for the statutory non-use period of five years. The first action taken concerning these claims was the filing of protests to the proposed determination of the State Engineer. This occurred from June through October 1950, more than five years after the amendment. Throughout the period from May, 1945, to May, 1950, there was absolutely no indication of any intent to resume use of these waters. The land and the water rights remained in the same condition as that described by Mr. Lambert above, and that condition in itself indicates an intention to abandon the water right.

Some fifteen years had expired at the time of the hearing on these protests since the amendment of section 73-1-4, and there is not one word of testimony of any overt act indicating an intention to resume use during that time.

Appellants assert (B. 23-24) the court's periodic extensions of time in which to file protests to the Proposed Determination of the State Engineer shield them from effect of the non-use statute. However, it must be noted that the protest extensions were of general application and could not be said to have any effect upon a totally separate and specific section requiring certain action of water users.

The non-use statute clearly states failure to use a water right for a five year period causes such water right to revert to the public. The general extension of

time in the matter of the proposed determination can no more excuse the performance of this duty by these parties than it would excuse any other duties imposed by separate acts of the Legislature.

Indeed, the Legislature provided a specific means whereby the five year period of the non-use statute may be extended. The enactment of such legislation itself indicates the Legislature felt that without such provision there was no means whereby the effect of a five year non-use could be avoided. It is well settled that the Legislature is presumed to enact useful and effective legislation.

Section 73-1-4, contains specific provision for extension of the non-use period and it is submitted that by the plain language of the statute the method (application of extension of time to the State Engineer for resumption of use) is the exclusive method of extending the non-use period. There is, of course, no showing by the appellants that any such application was made.

The appellants have produced no testimony that they were prepared to and would have resumed use except for the denial of their claim and right in the proposed determination. Further, there is no showing that the State Engineer actually denied the use of water or, indeed, had undertaken the distribution of water of the Escalante Valley between April, 1949, and May 15, 1950. There is nothing in the state statutes indi-

cating that during the pendency of a general adjudication proceeding before or after the filing of the proposed determination, the non-use statute becomes inoperative. The language of Section 73-1-4, permits no such implication.

The significant point to be remembered is that the appellants have not used this alleged water right for almost 30 years and have specifically failed to perform any overt act during the five year period from May, 1945, to May, 1950, which would indicate actual resumption of use or even an intention to resume use.

Section 73-1-4, as amended, provides water may be lost through either non-use or through abandonment. The lack of action on the part of appellants amounts in fact to an abandonment of any claim they may have had apart from the non-use provisions. As the Colorado court has said:

> "Abandonment is a question of fact, and must be proven. Abandonment of an appropriation consists in nonuse coupled with an intention of the owner not to repossess himself of the use of the water. Such intention may be express or implied. Where nonuse is shown which is continued *for a considerable length of time, and the acts of the owner show no intention of resuming the use*, it may be sufficient to *imply* the presence of an intention to abandon the right, *and, when legitimately implied be-*

comes proof, as a fact, of abandonment." (Emphasis added.)

Arnold, et al. vs. *Roup,* 157 P. 206.

Surely the failure to use water for some 30 years, the permitting of ditches and wells to fill and become inoperative and in fact obliterated, is sufficient lack of activity to infer an intent to abandon such rights.

CONCLUSION

Respondents submit the evidence and the law fully support and sustain the actions of the trial court and that said actions should therefore be affirmed.

Respectfully submitted,

E. J. SKEEN,
Attorney for Respondent
Milford Primary Pump Users,

WALTER L. BUDGE,
Attorney General,

RICHARD R. BOYLE,
Assistant Attorney General,
Attorneys for Respondent
Wayne D. Criddle.